

**U.S. Department of Labor**

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**Issue Date: 01 November 2007**

CASE NO: 2005 STA 46

*In the Matter of:*

WILLIAM S. FARRAR,  
Complainant,

v.

ROADWAY EXPRESS,  
Respondent

Appearances:

William S. Farrar, *pro se*  
For Complainant

Carl H. Gluek, Esquire  
For Respondent

Presiding: Edward Terhune Miller  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER ON REMAND  
DISMISSING COMPLAINT**

Statement of the Case

This case remanded by the Administrative Review Board (ARB) of the U.S. Department of Labor ("DOL") involves a complaint by William S. Farrar, a professional truck driver ("Complainant" or "Farrar"), against Roadway Express, his employer, a trucking company ("Respondent," the "company," or "Roadway") under the "whistleblower" protection provisions of § 405 of the Surface Transportation Assistance Act ("STAA" or "Act"), 49 U.S.C. §31105, and the implementing regulations at 29 CFR Part 1978. The claim was investigated by the Occupational Safety and Health Administration ("OSHA"), which notified Complainant by letter dated June 2, 2005, that the complaint was untimely filed, and, upon Complainant's objection to the findings and request for a hearing by letter dated June 14, 2005, referred the complaint to the Chief Administrative Law Judge ("OALJ") of DOL by undated letter which was received by OALJ on June 7, 2005. The case was originally assigned to this tribunal for a *de novo* hearing pursuant to the implementing regulations at 29 CFR Part 1978, and has been reassigned to this tribunal upon remand with instructions by the ARB. A hearing was scheduled and conducted in

Valdosta, Georgia, on July 10, 2007. Complainant appeared *pro se*; Respondent appeared by counsel with its corporate representative, Michael Doss.

Complainant filed his complaint dated April 16, 2005, with OSHA on April 20, 2005, alleging that his discharge by Respondent was in violation of § 31105 of STAA.<sup>1</sup> The complaint

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Sec. 31105. Employee protections

(a) Prohibitions.--(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--

(A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because--

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

(b) Filing Complaints and Procedures.--(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. On receiving the complaint, the Secretary shall notify the person alleged to have committed the violation of the filing of the complaint.

(2)(A) Not later than 60 days after receiving a complaint, the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

(B) Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

(C) A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation.

(3)(A) If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including back pay.

(B) If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.

(c) Judicial Review and Venue.--A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is

alleged retaliation for STAA protected activities and discharge as a commercial driver on or about October 26, 2004, by decision of a specified grievance panel based on work record and having a serious preventable accident. According to OSHA's findings dated June 2, 2005, Complainant "claimed to be fired by Respondent, Roadway Express, in retaliation for previously filing an STAA complaint in 2000." OSHA found that "Complainant was discharged based on 'work record and having a serious preventable accident'."

Complainant's objection and request for hearing complained in material part of the quality of the investigation by OSHA, and of the allegedly retaliatory conduct of Respondent's agents in presenting allegedly false information and misleading statements at a union grievance proceeding. Complainant was relieved of duty pending investigation of an accident on August 1, 2004; a Notice of Discharge was issued on August 7, 2004. Complainant suggested that the date of that grievance proceeding should be the relevant date of adverse action, which would bring his complaint filing date within the 180 day limitation for filing such complaints under the Act and regulations. He also complained of the rationale of the OSHA findings, and a variety of matters which are essentially immaterial to the issue presently before this tribunal.

#### Respondent's Motion to Dismiss Complaint

Respondent filed a Motion to Dismiss the complaint on July 21, 2005, contending that the complaint was not timely filed within 180 days after the adverse action occurred as required by 49 U.S.C. § 31105(b)(1).<sup>2</sup> Respondent alleged that Complainant was discharged effective August 1, 2004, in part for causing a preventable accident on that date which badly damaged Respondent's tractor trailer, and that was the pertinent adverse action. Complainant disputes that the accident was preventable. However, Complainant's grievance of his discharge was denied after a hearing by a grievance committee conducted under applicable union contracts. This tribunal dismissed the complaint as untimely by Recommended Decision and Order issued October 3, 2005, on the premise that Roadway's termination of Farrar's employment in August 2004 started the 180-day limitations period under the statute and regulations and that, as a consequence, Farrar filed his April 18, 2005, complaint beyond the 180 day limitation period.<sup>3</sup>

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issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the of the Secretary subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

(d) Civil Actions To Enforce.--If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

(Pub. L. 103-272, Sec. 1(e), July 5, 1994, 108 Stat. 990.)

<sup>2</sup> Respondent framed its motion as a request that the dismissal of the complaint by OSHA be affirmed. Because the case was before this tribunal *de novo*, the motion was treated as a motion to dismiss the complaint pending before this tribunal.

<sup>3</sup> Pertinent to jurisdiction, OSHA found, and it is not disputed, that Respondent is a person and commercial motor carrier within the meaning of 1 U.S.C. § 1 and 49 U.S.C. § 31105, engaged in transporting products on highways. Respondent maintains a place of business in Lake Park, Georgia, and hired Complainant as a driver of a truck with a gross vehicle weight rating of 10,001 pounds or more, to transport products in commerce over highways, which directly affected commercial motor vehicle safety.

## The Administrative Review Board's Decision

By Final Decision and Order of Remand issued April 25, 2007, the Administrative Review Board held that Respondent's Motion to Dismiss the case was improperly granted without addressing the basis for Farrar's complaint alleging that the testimony of Respondent's representatives at the grievance hearing panel was retaliatory and thus warranted relief under the STAA. The ARB held that the 180 day limitation period for filing the complaint was determined by Farrar's allegation to OSHA that at the October 26, 2004, grievance hearing, "Roadway retaliated against him for engaging in protected activity when it presented false testimony in an effort to persuade the hearing panel to uphold the termination of his employment." Slip opinion at 9. The ARB explicitly did not decide whether Farrar's allegations regarding the grievance proceedings are true or whether even if proved, would constitute retaliation and adverse action under the STAA, and remanded the case for this tribunal to make those determinations. The ARB held that Farrar had not demonstrated any question of material fact relevant to whether his complaint for the August discharge was timely filed 240 days after his termination, and thus beyond the 180 day limitation. The hearing in Valdosta, Georgia, was conducted pursuant to the ARB's directive.

## Respondent's Motion *in Limine* and Complainant's Response

Respondent Employer filed a Motion in Limine on June 4, 2007, to preclude Complainant from calling certain witnesses he had named possibly to testify in his behalf. In response this tribunal issued a Procedural Order Governing Response to Motion in Limine and Prehearing Requirements on June 8, 2007. That order specified the time and manner of response by Complainant to the motion, but also identified the issues to be resolved on motion or by trial, particularly with respect to the remand instructions several interim rulings.<sup>4</sup> This tribunal, suggesting that "exactly what happened and whose fault the truck accident was" was not before the tribunal, identified as issues "whether anything at the grievance proceeding is retaliatory in nature" and "what was the protected activity which would have [to] be correctly cited to generate the retaliatory activity." (CTr. 9) What the ARB ruled was identified as the law of the case. (CTr. 9) The identified gravamen of Farrar's complaint was "that Roadway retaliated against him when Roadway officials testified untruthfully at the October 26, 2004, grievance hearing in an effort to subvert the proceedings." (Slip opinion at 9)

The packet of documents which Complainant submitted to OSHA, but which had been returned to him by OSHA unopened, had been resubmitted to this tribunal. At the telephone conference on June 25, 2007, Farrar explained, in response to Respondent's motion *in limine* challenging his list of witnesses, that he had planned to call certain witnesses to corroborate certain of his allegations, but expected that it would be difficult to locate some of them. He indicated that the documentation originally submitted to OSHA should achieve the same result of establishing that Michael Doss, on behalf of Roadway Express, engaged in a pattern of discriminatory actions against Farrar following his filing of an OSHA complaint in the fall of 2000. (CTr. 10-11) This tribunal suggested that Farrar's complaint of a pattern or practice

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<sup>4</sup> References to the transcript of that prehearing telephone conference conducted on June 25, 2007, are denoted "CTr."

stemming from approximately forty discriminatory actions between 2000, when he filed his first safety complaint, and the grievance proceeding on October 26, 2004, was not before it, and that the tribunal could only properly consider what happened at the grievance proceeding as the basis of the pending complaint.

Farrar asserted that “in the packet at the grievance panel the testimony from the company referred to some prior accidents and the company took the position that those were my fault even though, I mean, they would be from the standpoint as far as the DOT rules go, the driver is ultimately responsible for the safe operation of the vehicle, but in the case of two accidents, there were citations. What the company did not stipulate in there was that those citations, I did go to court and I was able to prove that I was innocent because the citations were written before the full investigation had been completed.” Farrar asserted that the company was notified accordingly within a couple of days and provided with court documentation, but still proceeded with their original position that the accidents were his fault. (CTr. 11-12) Farrar also asserted that other drivers had had accidents, but he was the only one who was discharged and had to grieve, which he argued was discrimination. (CTr. 12)

Farrar explained that when he filed his first claim under the STAA in 2000, one of the investigators had advised him that, regardless of the outcome of that case, he should keep track of any incidents that were not normal or did not seem normal as applied to other employees, and that would be discriminatory, because historically companies that had such complaints brought against them would try to find a reason to discharge the employee, whether legitimate or not. The investigator had suggested that he maintain a diary of such incidents, which Farrar did, as reflected in the packet of documents submitted. (CTr. 33-34) Because of the potential significance of the issue, this tribunal, with the parties consent, issued an order to Respondent to show cause why testimony regarding these allegations should not be permitted at the hearing. (CTr. 35, 40-41) Also, pursuant to instructions issued during the telephone conference, Farrar was given latitude to submit his documentary evidence out of time. (CTr. 38-39)

Farrar asserted that Doss had told him in 2001 that he was going to fire Farrar “one way or another because of my position,” which “was the chief job steward and it was [his] responsibility to make sure that [his] co-workers complied with contract procedures and the company as well...” (CTr. 12-13) Farrar indicated that he filed the first OSHA complaint because he had been issued a warning letter for delay of freight, which he justified because of fog, and because normally it was not feasible to grieve warning letters because of their short six month effect. (CTr. 13-14) Respondent asserted that all such items that do not relate to the October 2004 grievance proceeding, in which Doss did not participate, would be time barred, and that whatever animus Doss might have had would be irrelevant to the company’s position at the October 2004 grievance proceeding. (CTr. 14)

Looking toward proof at the hearing, this tribunal also expressed reservations about what action could reasonably be proved to be retaliatory at the grievance proceeding, because it was an adversarial proceeding where two theories as to the cause of the truck accident were in conflict, a panel of two union representatives and two nonemployee company representatives and that animus by Doss, even if assumed, would be so attenuated as to be insignificant or irrelevant. (CTr. 15-16) This tribunal also suggested that Farrar’s allegation that the company failed to

make a sufficient investigation might as a practical matter relate to a business judgment which would not be inherently retaliatory or lead to false or misleading testimony, as alleged. (CTr. 16) Farrar stated that the brief that Williams presented on behalf of Roadway at the grievance proceeding would normally have passed on to Williams the information that Doss gathered. (CTr. 16) Tomlinson was the union representative who presented Farrar's grievance to the panel. Farrar says Tomlinson was aware of a lot of the prior discriminatory things because, historically, he settled most of the grievances with Doss that related to discriminatory things that never went to committee. (CTr. 19-20) Farrar testified at the grievance proceeding. (CTr. 21) During the telephone conference this tribunal initially ruled that evidence of Farrar's ongoing problem with Doss would be admissible in prospective testimony by Farrar, but testimony regarding and issues defined by the ARB. The order also set out a general statement of law applicable to proof of complaints under the STAA.

Complainant's Response to Procedural Order Governing Response to Motion in Limine and Prehearing Requirements, filed June 15, 2007, suggested that his documentation originally sent to OSHA, but returned to him unopened, could achieve the same proof as testimony by his proposed witnesses in establishing that Doss, on behalf of Respondent, "engaged in a pattern of discriminatory actions against Claimant following Claimant's filing of an OSHA complaint in the fall of 2000." In his response to the order Complainant identified what he characterized as "false/misleading testimony" at the grievance proceeding as follows:

As to the issue of false/misleading testimony at the October 26, 2004 grievance hearing, Mr. Williams [who presented Roadway's case before the grievance committee] was very dramatic in stating the company's (Mr. Doss') version of the accident. He stated that "the photos of the accident scene conflict with (my) statement." (transcript, pg. 3) Contrarily, to an educated eye, the photos support exactly what Claimant tried to tell them. Mr. Williams was misleading in his testimony by implying that "applying brakes, flashing lights, or anything else" would result in avoiding a crash with a vehicle coming at you head on, in your lane, at 60 mph or better. Mr. Williams also stated falsely that "Farrar could have stopped the unit on the grass, had he applied brakes; having "traveled 243 feet in a straight line". Mr. Williams was misleading/false in stating that the shoulder and grass was "flat", though the photos from the scene show otherwise. Mr. Williams false stated that "Mr. Farrar allowed himself to go to sleep... and ran off the highway." Again, the photos do not support that theory. Mr. Williams' own testimony contradicts itself. The photos showed the slope of the ditch, so how do you travel "243 feet in a straight line" when you're "asleep at the wheel?" Mr. Williams was misleading in implying that the cargo was a total loss, though on scene photos show a Roadway 53 foot trailer loaded nose to tail with freight salvaged from the wreck. Testimony about Hazmat cleanup was misleading because the 3210# and 122# shipments of flammable liquid were recovered intact. The "hazmat cleanup" amounted to skimming engine oil/diesel fuel off the pool of water. (Diesel fuel is excluded from hazmat spill reporting in the course of a vehicle crash. (49 CFR 390.15(b)(1)(vi)). Through it all, Respondent never produced anything to constitute an attempt at conducting an investigation.

As to the issue of discriminatory actions, Respondent continued to ignore the findings of the Florida Highway Patrol Investigating Officer, though the report was available to Respondent for over a month prior to the grievance hearing. (The discharge could have been rescinded, as has been the case with other employees when all the facts are known.) Respondent failed to fulfill financial obligations to Claimant resulting from the panel sustaining the discharge.

...Claimant believes adverse actions prior to the grievance hearing are relevant to the extent that various forms of discrimination by Respondent are documented in Claimant's diary, substantiating Claimant's allegation that Respondent's actions on October 26, 2004, as well, violated the STAA. The October, 2000 OSHA complaint was filed because Respondent issued discipline for "Delay of freight" resulting from Claimant's compliance with 49 CFR 392.14 due to extremely thick fog.

#### Prehearing Telephone Conference – Issues Raised

A lengthy prehearing telephone conference was conducted on the record on June 25, 2007, with the *pro se* Complainant and Respondent's attorney at which this tribunal identified and sought to clarify the primary issues as then understood, including the focus and scope of permissible evidentiary proof, and the instructions of the ARB, and made experiences of other drivers or allegedly discriminatory actions over 2000-04 as proof of the company's motive in presenting its case to the panel would be excluded.

Respondent's position was that even though Doss might have assembled documents and assisted the company in preparing its brief and submission to the grievance panel, that would not involve untruthful testimony and Doss's mental state would be irrelevant because he did not participate in the grievance hearing. The hearing transcript discloses that "what the company simply did is introduce a handful of exhibits and then make argument from those exhibits. There is no testimony." (CTr. 20-21) This tribunal suggested that the adversarial process would normally allow broad latitude to a party's good faith presentation of a variety of documents and arguments in support of its position. (CTr. 23-24-25) This tribunal suggested that the record before it did not indicate that the company did anything at the hearing that it was not reasonably entitled to do under the circumstances, regardless of what its animus might have been, unless the position of the company could be shown to be so clearly and flagrantly contrary to the facts as to constitute fraud or bad faith or a clearly erroneous or otherwise wrongful position for the company to take, recognizing that this was an accident without witnesses except for Farrar, dependent upon limited circumstantial evidence. (Tr. 25-26)

At the conclusion of the telephone conference there was a recapitulation of the basic issues before the tribunal; the tribunal ruled that based on the discussion the testimony of the Complainant's witnesses should be barred concerning the series of allegedly discriminatory actions occurring between 2000 and the grievance hearing proceeding in 2004 because, among other reasons, the allegedly discriminatory actions are time barred as the basis for complaint under the STAA, and because the identified witnesses are neither mentioned nor did they participate in the grievance proceeding (CTr. 32-33)

### Order to Show Cause and Rule on Evidence

Following the prehearing telephone conference, this tribunal issued a Summary of Pre-hearing Telephone Conference and Order to Show Cause. That order summarized essential aspects of the telephone conference and, among other things, explicitly adopted the ARB's definition of the relevant protected activity which referred to Farrar's first complaint on November 3, 2000, and second complaint on October 6, 2002, which had involved termination of Farrar's employment and reinstatement, and subsequent withdrawal of the complaint, which Farrar alleges motivated Roadway to discriminate and retaliate against him at the grievance proceeding on October 26, 2004. Respondent's Motion *in Limine* was granted, and the potential witnesses listed by Complainant were barred from testifying. In addition to procedural matters, the order included a consent order for Respondent to show cause why Complainant should not be permitted to adduce evidence of the enumerated allegedly discriminatory actions by Roadway against Complainant in the period after the 2000 STAA complaint to the October 26, 2004, grievance proceeding, as recorded in Farrar's diary in the proffered packet of documents. The order was premised on the assumption, among other things, that Claimant would offer such evidence to show animus motivating Respondent to offer false information and to make misleading statements before the grievance panel. Complainant was allowed an opportunity to respond, but did not do so.

Following receipt of Respondent's brief, this tribunal issued an Order Governing Evidentiary Proof at Hearing on July 6, 2007. Complainant's exhibit "C-2 – History of alleged violations (discrimination) since Oct 2000 OSHA filing," which was the packet of documents OSHA had refused to file and which was lodged with this tribunal, which treated it as a proffer to establish a history of discrimination that would prove adverse motive. This tribunal ruled that the evidence proffered would be time barred as a remediable complaint, but that "the nature of the complaint under the STAA, and, in particular, the complaint that Respondent's presentations at the hearing reflect unlawful animus and the continuation of a pattern of discriminatory practice by Respondent against Complainant, makes Complainant's proffered evidence relevant as background to the alleged discriminatory conduct and proof of animus which Complainant claims occurred at the hearing. As such it would be admissible as relevant evidence at the hearing." However, the admissibility of the proffered evidence would be subject to the constraints provided by the principles of Fed. R. Evid. 403, allowing exclusions of evidence to the extent that its probative value is outweighed by other considerations. The order provided that the claimant's C-2 should be admitted into evidence at the hearing as background, but provided a detailed procedure, including time limits and witness limitations, for adducing and responding to the evidence by the parties. Respondent recorded an objection to the prescribed limitations at the hearing.

### The Formal Hearing

At the hearing on July 10, 2007, in Valdosta, Georgia, Claimant appeared pro se; Respondent appeared by counsel with its corporate representative, Michael Doss. (Tr. 5) The tribunal reiterated its position that the hearing would not involve relitigating the grievance proceeding, and not an extensive review of Complainant's grievances against the company.



Complainant was advised that he had the burden of proof, he was advised of the elements comprised in that burden under the STAA, and the method of proceeding, including that the rules of evidence in Part 18, 29 CFR, apply to such cases. (Tr. 8-9) The order of proof was established to be, initially, proof of the protected activity in 2000; second, the allegation of false or misleading testimony or information presented at the grievance proceeding to undercut the proceeding; and, third, proof of the causal relationship between the protected activity in 2000 and the allegedly discriminatory or retaliatory action at the grievance hearing on October 26, 2004. (CTr. 9-10) Complainant was also advised that, although his diary describing a continuing pattern and practice of discriminatory acts by Respondent had been ruled admissible, it would not be deemed admissible to show a causal connection or relationship until an adequate foundation had been established showing that there had been discriminatory activity on Respondent's part and that there had been prior protected activity.<sup>5</sup> (CTr. 9-11)

### Findings of Fact

Farrar filed a complaint with OSHA in late October 2000 following his discipline in the form of a warning letter issued by Roadway for delay of freight because Farrar had made an unscheduled stop during a road assignment. He claimed that heavy fog obscured visibility and raised a safety issue. That complaint was ultimately dismissed by a court without a ruling on the merits when Farrar failed to appear for a scheduled hearing. (Tr. 23-27, 31-32, 34) Farrar contends that that complaint filed with OSHA constitutes the protected activity which caused Roadway to retaliate against him by providing what he alleged was false and misleading testimony to the grievance panel on October 26, 2004.

Farrar proffered documentary evidence in the form of a purported diary and list, which has been lodged with this tribunal, which he declared would prove that over the years subsequent to his complaint to OSHA in October 2000, Roadway and its agents, primarily the manager Michael Doss, who was Farrar's supervisor, effected at least forty, varied, and frequent actions against him which were discriminatory and retaliatory in nature up to and including false and misleading testimony at the grievance proceeding on October 26, 2004. Farrar contends that such actions provided continuity and related back to his complaint to OSHA in 2000.

Among the incidents thus cited, Farrar had filed another complaint with OSHA in 2002 following termination of his employment by Roadway for a truck accident, but was subsequently reinstated. Complainant testified that he had contested the traffic citation and had been exonerated, after which he was reinstated by Roadway. This incident was referred to by Roadway in its case before the grievance panel as part of an adverse record which justified in part Farrar's termination after the August 2004 accident. Farrar identified this incident in 2002 as part of the continuing discriminatory actions by Respondent. Complainant testified that he did not think he had ever contacted OSHA again. (Tr. 33-34)

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<sup>5</sup> Complainant had not been able to serve his subpoena upon an apparently evasive witness, Tomlinson, who had been the union business agent who presented his case at the grievance proceeding. However, Complainant indicated on *voir dire* that the loss was not too significant in that "at the grievance hearing Mr. Tomlinson pretty well laid out the information that we had known to us as fact in the case," and there was probably not much that he could add to the transcript. Consequently, this tribunal ruled that the hearing should proceed. (Tr. 13-14)

## The Grievance Proceeding<sup>6</sup>

The Complainant's Grievance Proceeding was conducted in accordance with the pertinent labor contracts on the record by a four member panel consisting of a Union Committee of two members and Employer Committee consisting of two members, selected and engaged as described by the Employer's representative, Williams, at the hearing on July 10, 2007. (R-1, 2, 8; Tr. 129-30) A transcript of the tape recorded hearing is in evidence. (R-8) Complainant and the Employer were each represented by individuals experienced in such work, Tomlinson and Williams, respectively, who presented the positions of the parties with reasonable clarity and completeness. It was undisputed that Williams, who presented the Respondent Employer's case, was not a witness testifying with personal knowledge of the facts. (Tr. 38-39) Williams had been briefed and had prepared his presentation with the aid of Michael Doss. Neither party was prevented from making any statement or presenting any evidence during the hearing, and there were no recorded objections suggesting such a circumstance. The evidence before the committee was identified and evident from the record. Complainant stated on the record that he felt that his Local Union had properly represented him in this matter. No participant of record before the panel was under oath. Complainant's grievance was denied by the committee after a full hearing at which Complainant stated to the panel on the record that he "had the opportunity to present any and all evidence that [he felt] pertinent to [his] case before this Committee today."

The grievance involved Farrar's termination by Roadway soon after the serious truck accident which badly damaged or destroyed Roadway's tractor, trailer, and much of the cargo. Farrar was the only known witness to the circumstances causing the accident. He described the accident as caused by an oncoming vehicle with high beams which had crossed into his lane and caused him to take evasive action and run off the road onto a soft shoulder. The grievance proceeding focused primarily on circumstantial evidence which related to the configuration of the tire tracks and the parties' conflicting assessments of that circumstantial evidence from photographs presented to the committee by Williams.

Farrar was the only witness to testify at the grievance proceeding. He was advised by panelist Thomas that, "this is your opportunity now to put anything and everything that you feel pertinent to your case on the record here before us today. Anything that you put on has to come on now." Farrar made an extended statement on the record which focused briefly on the police officer's estimate of damages and certain inaccuracies in the police officer's report. He denied that he had fallen asleep; he claimed that the accident was unavoidable; and he explained that he

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<sup>6</sup> Complainant was advised concerning his claim that Respondent gave false and misleading testimony at the grievance proceeding, that there is a difference between testimony and argument, and that the Respondent contended, and the transcript of the grievance proceeding seemed to show, that Respondent presented no witnesses who actually gave testimony at the grievance proceeding, but that Williams presented only argument and documents on behalf of the Respondent. (Tr. 35) Complainant was also advised that the meaning of false statement could include knowingly untrue and inaccurate statements, or statements that were "simply wrong," and of a possible distinction between activity consisting of false or inaccurate statements which might be motivated by an intent to retaliate, and a party's right in an adversarial proceeding to present argument to the grievance panel based on disputed facts and to draw reasonable inferences and conclusions from those facts. (Tr. 36-37) Suggesting some misunderstanding on his part, Farrar testified, "I understand in a Court scenario you have testimony under oath. At these grievance panel hearings, I was always told, of course when we sit down and do this we're supposed to be telling the truth which to me is basically the same as testimony...And it's often referred to as testifying before the Committee. And that's where I took the terminology."

had not applied the brakes on the tractor trailer because he did not consider braking his Volvo truck an option. He testified that he had made a split second decision to take evasive action toward the side of the road in accordance with learned safety procedures to avoid the oncoming vehicle, the glare of whose high headlight beams had obstructed his vision, and which had crossed the center line into his lane. He said he tried to avoid a collision, but his tires slipped off the pavement into soft wet grass of the west shoulder of the roadway and he lost control of his heavily loaded tractor trailer traveling at something less than the sixty miles per hour speed limit. The vehicle overturned and landed in a canal.

Farrar's union representative, Tomlinson, made essentially the same points. He also referred to Farrar's truck logs recording Farrar's midnight dispatch and two stops during the trip. Photographs provided to the panel showed the scene of the accident and the overturned tractor trailer and tire tracks among other subjects, including damaged freight. Both Farrar and the union representative emphasized that Farrar had fully cooperated with the investigation by the police, and provided certain requested information, as well as taking certain measurements at the scene, though Roadway had neither conducted a thorough investigation nor promptly provided requested registration information to the Florida police officer. Tomlinson acknowledged that the reports of Roadway and Florida officials were not very informative because they simply reflected what Farrar told them. Farrar and Tomlinson argued that trained law enforcement officers determined that Farrar was not at fault; that the police officer had recorded no improper driving or action; and that Farrar's vision was obstructed. Tomlinson also emphasized that the accident report was not completed until August 17, 2004, sixteen days after the accident and ten days after the Company had discharged Farrar, after allegedly completing their investigation, but without having the official accident report. Tomlinson also argued that Farrar at age 53 had been driving a truck for thirty-five years and eleven months since leaving the military, and had been driving a truck for Roadway for more than twelve years, so that he was by implication a very experienced driver.

Farrar's handwritten statement which he had provided at the scene of the accident conformed in essence to the statement attributed to him in the police officer's report. In addition to a second typed statement by Farrar, the panel had before it the Florida Traffic Crash Report containing the police officer's damage estimates and notations that the road surface condition was dry and without defects, that the weather was clear, and the traffic way straight and level.

Roadway's contentions of record before the panel were that Farrar, while en route to Lakeland, Florida, on August 1, 2004, at approximately 5:30 a.m., fell asleep and lost control of the tractor and trailer and ran off the highway and overturned, and that the accident resulted in both the tractor and trailer being scrapped, hazardous materials being released into the environment, and serious damage sustained by customer freight. Roadway contended that Farrar was justifiably discharged for a serious preventable accident, and that without substantiation for Farrar's statement that he had been run off the road by a second vehicle that appeared to drift across the centerline, the photographs of the tire tracks on soft ground showed that Farrar had gone to sleep. Roadway's representative, Williams, asserted before the panel that Farrar was an unsafe driver who refuses to take responsibility for his actions, that he is a danger to the motoring public, and that, "He was very fortunate that this repeat performance of his past history did not cost him or someone else their life. There's nothing other than his story to indicate there

was a second (2<sup>nd</sup>) vehicle. In fact, the facts show just the opposite. Mr. Farrar went to sleep and ran off the road.” Williams pointed out that there was no braking action, and requested that the discharge be upheld.

Roadway declared that it completed its investigation to the point that it felt that a discharge was justifiable, and pointed out that despite the union’s emphasis on the Company’s lack of investigation, Tomlinson and Farrar did not contend to the Committee that there was any contract violation regarding timeliness or the way Roadway discharged Farrar. Roadway also argued, based on a map before the panel, that the road was straight and that Farrar could have seen the oncoming vehicle with its headlights on high beam far ahead. Roadway contended that an adjuster was not assigned to assess the accident because it was not necessary for a single vehicle accident; that a post accident drug screen was not required by DOT; and that, since there were no witnesses except Farrar, the police officer’s report was dependant upon his statement. Roadway also emphasized that there was no evidence that Farrar had used his brakes, which was admitted by Farrar, though the effect of the omission was unresolved.

Questions from members of the grievance panel and responses by Farrar established that Farrar was relieved of duty at the scene and got home by rental car since diesel fuel soaked clothing probably denied him access to a bus. The trip to Lakeland from Valdosta and back is approximately 430 miles. Farrar responded to questions with testimony that he noticed a car coming at him with bright lights when it was probably about two miles ahead and he was running at the posted speed limit of sixty miles per hour. He slowed to about fifty-five miles per hour as he moved as close to the right as he could to get enough room. Farrar had measured eleven feet from the highway centerline to fog line or edge of pavement, and stated that the width of a tractor/trailer is eight and a half feet, which gave Farrar about two and a half feet to get over. Subsequently, on questioning from committee member Thomas, Farrar stated that it was eleven feet from the inside of the white centerline of the highway to the inside of the white fog line, but there were four feet of additional pavement, though it varied, to the right of the fog line, so that there was actually about fifteen feet of pavement.

Farrar said that when he first felt his wheels go off the road, he was still traveling close to fifty-five miles per hour. Under the circumstances he described regarding the approaching car, which was across the centerline, Farrar said somebody had to do something and slowing down was not the answer. He said there was no need to go any slower because the vehicles were too close. Farrar was closely questioned by Thomas of the Employer’s Committee about what he meant when he said the rear trailer wheels pulled him off the road when the right wheels dropped off pavement onto damp, grassy shoulder, the trailer started to slip sideways to right, pulling tractor off with it. Farrar responded in some detail, with reference to photographs. Thomas commented, however, “Using those same tracks that you’re showing me right there, show me where you indicate that you’re on the side of the road. To me, those tracks look like they’re coming right direct off the road right there.” Farrar responded to another question that the vehicle with its lights on bright was the only one within a two mile stretch, though there had been three vehicles of varying types a few miles earlier. He described the timing of the officers on the scene before and after the change of shifts at 7:00 a.m.

### Farrar's Testimony at the Hearing, July 10, 2007

Farrar testified at the hearing on July 10, 2007, that he understood from statements by Tomlinson, who presented Complainant's case as the union representative at a local hearing in September 2004, that there had been no proof of an investigation or documentary proof of any investigation on the part of the company into the accident, and that there was no confirmation that any of parties had visited the scene in person. (Tr. 39) Williams read into the record, as disclosed by the transcript of the grievance proceeding, the statement that Farrar wrote at the scene of the accident at the request of the local terminal manager of Respondent in Lakeland, Florida, who was at the scene three or four hours after the accident (Tr. 40-41) Farrar testified that Williams referred to Farrar's statement numerous times, when stressing the company's position that Farrar had gone to sleep at the wheel and had driven off into the ditch. Williams had stated that Farrar had not mentioned applying the brakes, flashing headlights, or other actions. Farrar testified that all flashing of lights was done prior to the point in time when he began his narrative statement, and that there was an S-curve in the road approximately where the truck ran off the road. (Tr. 41)

Farrar testified that everyone kept talking about flat terrain and being able to stop on the grass, although he testified that two hundred forty-three feet is not enough room to stop a vehicle of that size, which was roughly 70,000 pounds, thirteen and a half feet high, with an extra three thousand pound load on the right side, on damp grass as shown in pictures. Farrar testified that based on charts and safety courses with which he was familiar it would take 288 feet at 55 miles per hour on dry pavement with good brakes and good tires to stop a typical tractor trailer operated by Roadway, and twice the dry pavement stopping distance to stop a vehicle on wet pavement. He estimated 800 to 1000 feet to stop on the muddy ditch. (Tr. 41-43) Farrar did not know whether the grievance panelists were truck drivers; only that they had years of experience within the companies in the freight business, but were broadly experienced in different aspects of the freight business. (Tr. 44) He testified that he was traveling less than sixty miles per hour in a sixty miles an hour speed zone, and that the committee should have known when presented with the company's case that it was not possible to stop in less than 288 feet at 55 miles per hour. Consequently, he contended that this was false and misleading information presented to the panel.

Farrar also testified that the photographs that were presented did not show tire tracks consistent with a driver asleep at the wheel, and that Trooper Hill had witnessed those tracks at the scene of the accident as reflected in the Florida Highway Patrol accident report available to the company. (Tr. 45-46) Farrar testified that the significance of the Florida Highway Patrol accident report was that it reflected an investigation by the police officer, who was on the scene, took statements, including one from Farrar, the driver, and looked at the visible evidence at the scene including the configuration and distance of the tire tracks. (Tr. 46-47) Farrar said he did not follow the officer around, and did not know whether she had taken measurements, because he was trying to assist the other people with the recover[y] part. He assumed that the officer felt confident that what he had told her was exactly what had happened, and that from her experience in investigating numerous accidents indications of asleep at the wheel were not evident at the scene. (Tr. 46-47)

Farrar testified that in Respondent's brief presented to the grievance panel Williams had referred to a history of unsafe driving and preventable accidents; in particular, that on May 7, 2002, Farrar had allowed his unit to cross the center line on a Florida turnpike and force another vehicle off the highway doing serious damage, and been given a citation by the Florida Highway Patrol, but that Farrar had claimed it was not his fault and that the other driver overreached, and that "witnesses disputed the claim." He testified that the company was aware in October 2004 that that was the May 2002 discharge that he referenced in his diary, and that he had successfully contested the citation in Traffic Court on August 7, 2002, after the judge reviewed photographic evidence and testimony and dismissed both charges. Farrar testified that the 2002 grievance panel had that information and that committee deadlocked. The October 2004 grievance panel had the company's representation in its brief, but not Farrar's representation regarding exoneration. Farrar testified that there were five prior accidents referred to by Respondent in its brief and he thought that was what Williams referred to as "past history" on page 3 of the transcript and contended that Farrar was a danger to the motoring public. (Tr. 48-49; R-3)

Farrar testified that the statement in the transcript at page 3 that "it is obvious that he is a danger to the motoring public. Mr. Farrar simply went to sleep and ran off the highway, it is very fortunate this repeat performance of his past history did not cost him or someone else their life..." Offered no proof to back this up whatsoever and this is misleading to the committee in my opinion." (Tr. 50; R-8) Although there were a number of references by Williams to Farrar's falling asleep and running off the road, there was only the one reference to Farrar's past driving history that was made to the grievance panel which was in the brief. (Tr. 52-53) Farrar agreed that the transcript accurately reflects what the grievance panel was actually told by Mr. Williams. (Tr. 54) Williams normally and routinely presents cases to the grievance panel for the company. Farrar had never had any relationship with Williams except in that context as a presenter at grievance hearings. (Tr. 55)

Farrar was explicitly advised by this tribunal at the hearing that it was essential that his testimony identify each and every false or misleading statement or representation of concern to him as a basis for his complaint, and that he explain why he considered the statement or representation to be false or misleading. In response he referred to the "stopping on the grass part." This reference was presumably to the issue of the estimated distance required for the truck as described to stop on damp grass after it ran off the road, as compared with the distance that Complainant estimated would have been required for the tractor trailer to stop on a dry highway with good tires. Farrar also identified as a misrepresentation on p. 3 "in reference to where it was stated that in my statement I had stated that the vehicle had nearly straddled center line, the wheels dropped off damp pavement and it goes on down through a couple more statements there referring to that and states then that the photos of the accident seem also conflict with my statement." Farrar testified, "In fact, those photos support my statements." (Tr. 56-57)<sup>7</sup>

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<sup>7</sup> Complainant testified that he had taken a number of pictures of the accident scene with two disposable cameras on August 1, but that the pictures had not been offered to the grievance panel because "the company already had pictures that were basically the pictures here...as far as showing basically the scene that was, we pretty well, we looked at that and - we could probably go along with photos that were there...we didn't bring these out because...very little emphasis was put on the photos at the grievance panel except that in Mr. Williams' testimony he made some comments with regards to the tracks, the photos not supporting what I had stated as far as the trailer slipping sideways in particular." Since the photos had not been before the grievance panel, Respondent's objection

In response to a question, “[B]ased upon any or all of these photographs or none, to what extent if at all do any of these photographs support your assertion that there were misleading or false statements made with respect to what happened at the accident and immediately thereafter?”, Farrar testified that the photographs tended to support his description that when the accident happened at about 4:20 in the morning, the trailer had started to slip sideways to the right and the tractor pulled off with it, and that the tractor trailer had not traveled in a straight line from the road, but that the trailer had started to slide down the ditch because of the slope of the ditch, which caused it to go sideways a little bit which pulled the rear of the tractor to the right, causing it to miss the end of the culvert and ultimately laid it over. Farrar testified that once he got off the road, he tried to keep to the edge where he could ease the truck back onto the road once the vehicle in his lane had passed, but he was not aware that the ditch was muddy, and he lost control. (Tr. 65-66)

Farrar testified that the photographs did not support the Respondent’s contention that tire tracks and other indicia in the photographs indicated that Farrar had fallen asleep behind the wheel. (Tr. 72-74) Farrar denied that the photographs and the tire tracks portrayed would indicate the possibility of sleep behind the wheel during which he could have lost control, because the angle to the right was too sudden, and if caused by asleep would have been a gradual drift off the edge of the pavement. (Tr. 77) Farrar also emphasized his disagreement with the proposition that because the road was dry he could have stopped on the shoulder, and testified that there was no way to stop a seventy thousand pound vehicle in the pictured muddy soil in 243 feet. (Tr. 66-67) Acknowledging that much of his assessment had been presented to the grievance committee, Farrar testified “that it was misleading as a minimum on the part of the company to keep hammering that these photos did not support the statements that were in my statement and also the Florida Highway Patrol report which was included and presented as evidence at that committee.” (Tr. 80)

Farrar identified as inaccurate the contention that most of the cargo was lost, when there was a photo of a fifty-three foot trailer that was loaded practically to the rear, nose to tail, double stacked with salvage freight from the load, although they discarded some stuff in a dumpster. (Tr. 81) Farrar thought that the representation regarding lost freight by the company overstated the value and understated the salvage. (Tr. 82-83) Farrar identified no misleading statements made at the grievance proceeding regarding his own statements about the accident which were introduced at the grievance proceeding, other than Williams’ comments that the photographs presented did not support Farrar’s statements. (Tr. 86-88) Farrar also testified that the failure of the company or the terminal manager to provide requested vehicle information to the state trooper, so that she could complete the accident report could have had a retaliatory motive. It was unavailable at the time the trooper was on the scene because it was under water in the tractor. (Tr. 88-90) Farrar testified that the trooper had investigated the scene “for quite some time,” that

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to their relevance and admissibility was sustained, in part because the only question before the tribunal was whether there were misrepresentations or false statements on the company’s behalf that improperly exceed fair or proper argument. The exclusion was deemed to extend also to Complainant’s aerial photographs because they also were not before the grievance panel. (Tr. 57-62) Respondent’s photographs in R-6 were before the grievance panel and were deemed accurate and sufficient by Complainant, who had observed most of the subject matter portrayed, and were received in evidence. (Tr. 62-65; R-6)

there was no witness other than Farrar himself, and determined that there was no need for a citation. (Tr. 91)

Farrar cited page 11 of the transcript of the grievance hearing to the effect that Respondent completed its investigation and based upon it concluded that discharge was justifiable, but “there was never any documentation brought forward to show or offered even after it was requested by Mr. Tomlinson any documentation to show that any kind of investigation was done.” (Tr. 92) Asked what was not investigated that should have been, Farrar testified, in substance, that given the extent of damage, he would have sent an experienced investigator to try to determine what happened, or “at least be satisfied that what was stated was, could have conceivably happened.” (Tr. 93) He noted that the terminal manager had been at the site and taken “a couple of pictures of it,” but otherwise Farrar was unaware of any investigation by the company. (Tr. 93) Ultimately, Farrar’s evidence in addition to his testimony consisted of the photographs introduced at the grievance proceeding, R-6, and the transcript of the grievance proceeding. (Tr. 94) His inventory of problems over the years and an unnumbered supplement were lodged with the tribunal and treated by this tribunal as the subject of a proffer. (Tr. 94)<sup>8</sup>

On cross-examination, Farrar testified that he had been a union steward since 1995, and had attended approximately eight to ten grievance committee proceedings in the past. (Tr. 98) He acknowledged that at grievance committee proceedings the union advocates for one side and the company advocates for the other side. (Tr. 99) He believed that the purpose of the grievance committee was for the disinterested panel to decide which advocate was most persuasive. (Tr. 99) Farrar confirmed that he had seen his statement, and the Florida Highway Patrol accident report attached as an exhibits to R-4, and generally confirmed that R-5 consisted of the exhibits presented to the grievance panel by the union on Farrar’s behalf. (Tr. 100-01, 103) He testified that there was no HAZMAT spill in the cargo, and that the fuel oil leak was not considered reportable under DOT reporting requirements. (Tr. 120)

Farrar admitted that he had been involved in accidents on May 7, 2002, as to which he had received a citation from the Florida Highway Patrol, but denied fault; November 25, 2001, October 26, 2001, July 6 12, 1998, and December 3, 1995, for which he received a citation for reckless driving, though he denied fault in the several instances. (Tr. 103-06) Respondent contended that the cause of the accidents was irrelevant because the purpose of Williams statement at the hearing that Farrar “was very fortunate that this repeat performance of his past history did not cost him or someone else their life” made the issue of fault irrelevant to whether the statement was true. (Tr. 116) Farrar contended that the company was trying to blame him for being at fault in relation to the accidents when his own investigation had found other causes. (Tr. 117) Farrar had explanations to avoid blame for the other two accidents referred to. (Tr. 118-19) He testified that he contested the May 7, 2002, citation in court and was acquitted in a judge trial. (Tr. 108-11) In another instance, he had a defective steering box on the tractor interacting with other factors that caused the November 25, 2001, accident, but he was issued a warning letter. (Tr. 111-13, 115-16) Farrar testified that the October 26, 2001, accident was due to a dry fifth wheel; that the July 12, 1998, accident was due to a “bad glad hand”; and the December 2003

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<sup>8</sup> Complainant was given an opportunity during the luncheon break to consider whether he had any further documentation to support his case, after an inventory of what had been offered and what had been received.



accident went to court and he established that he was in his lane when he was sideswiped. (Tr. 116-19)

Farrar admitted that his statement did not mention any attempt to flash his lights; that the accident caused diesel fuel to spill into the creek and caused damage to customer freight; that the road surface was dry; that the weather was clear; he did not put on his breaks; that he had slowed to approximately 55 miles per hour from 60 miles per hour. (Tr. 106-07) Farrar testified that he had not mentioned that he felt he was being retaliated against to the grievance panel because they do not deal with those issues and only uphold the applicable contract, The National Master Freight Agreement. (Tr. 107-08)

#### Williams' Testimony for Respondent at the Hearing

Edward Williams testified that he had been employed until he retired on February 1, 2006, by the Respondent, Roadway Express, as a labor relations manager for twenty-two years. As such he represented the company before the grievance committee on grievances from union employees. (Tr. 124-25) He described the grievance process in the southern region as governed by the pertinent labor contracts, describing the committee as comprised of two union officials and two employer officials not of the same employer or local union as the grievant, but without time limits on their periods of service on the grievance committee. (Tr. 129-31) He had represented Roadway Express before the Southern Multi-State Grievance Committee in connection with Farrar's grievance in October 2004. (Tr. 132) He confirmed that neither the union representatives nor the employer's representatives were employees of Roadway express; the union representatives were employees of the Teamsters. (Tr. 132-33)

Williams testified that in representing the company at Farrar's grievance proceeding, he submitted his brief to the committee with attached documents and made his argument, but the company did not put on any witnesses or provide testimony. (Tr. 133-35; R-4) He described the photographs admitted as R-6 as having been taken by Roadway Express's Lakeland, Florida, terminal manager, and as being accurate pictures of the scene and unaltered so far as he knew. (Tr. 136-38; R-6) He identified the grievance and documentation presented to the grievance committee by the union in R-5, and the transcript of the hearing as accurate. (Tr. 138-39; R-5, R-8) Williams denied being aware at the time he presented the company's case in October 2004 that Farrar had previously filed an OSHA complaint against the company. He testified that OSHA complaints would be the responsibility of the Safety and Health Department, and not the labor department of the Respondent, and that he did not get involved with OSHA complaints or filings. (Tr. 140) Williams testified that he was not responsible for investigating accidents, and did not do so in preparing for the hearing in October 2004. He did not decide whether to call an adjuster to the scene, but testified that no adjuster was called to the scene because it was a one vehicular accident; there was no need in most instances for the investigation as a matter of company policy; that the purpose of an adjuster is to protect the company on liability, especially when other vehicles are involved. Responsibility for the investigation, he said, would lie with Farrar's manager. (Tr. 141-42)

Williams argued to the committee that he believed that Farrar fell asleep at the wheel "because first of all, in looking at the pictures, it's pretty obvious that Mr. Farrar veered in a

straight line off of the pavement. There's no indication of any swerving or jackknifing or turning or anything related other than a straight line veering off the road." He referred to the pictures on the third page of R-6 as showing an obvious straight line in veering off the pavement. Williams also cited Farrar's statement that he did not apply the brakes and concluded that brakes were not applied and there was no reduction in speed, all of which indicated that Farrar went to sleep at the wheel and veered off the road. Williams professed that he could think of no reason why a driver would not brake in such a situation, if only to slow down. (Tr. 145) Williams professed to have participated over twenty-two years in hundreds of grievance hearings in which the issue was whether or not an employee had sustained a severe preventable accident and Farrar's case was handled like the rest. (Tr. 147)

On cross-examination Williams testified that he had never driven a tractor trailer, and did not know how to calculate how far it would take to stop such a vehicle. He had prepared and composed the brief he submitted himself. (Tr. 148, 151) He testified that he had lost a lot of cases before grievance committees, including an earlier one with Farrar, though he believed that he had good credence with the committee. (Tr. 152-53) Williams testified that in preparing his presentation, he was provided with the documents from the facility manager, who was Michael Doss, and then took those documents and prepared the entire case himself as reflected in the brief. (Tr. 155) He received all of the documents attached to the brief from Doss, and no one else. (Tr. 156)

Williams explained that he handled cases from thirty-three terminals and more than 150 cases per month, so that each and every manager provided him with documentation on each and every case, including progressive discipline on each employee as a matter of standard procedure, which was used in this case. Williams testified that he discussed with Doss what objective he should seek in his presentation, but all the discretion on how to proceed in his cases, and that Doss did not indicate a preference as to how the case should go, although Williams had an impression that Doss had investigated the case and provided Williams with supplemental information based on that and how the documents related to each other. (Tr. 156-57) Williams identified the third and fourth pages of R-3 as documentation, in effect his cover explanation which Doss prepared, together with the individual documents. That corresponding information between Doss and Williams on the third and fourth pages of R-3, in effect the briefing paper for Williams prepared by Doss, was not given to the union and was not used at the grievance committee proceeding, though it was used in preparation of the case. Williams testified that he received the exhibit prior to the local union meeting in September 2004. (Tr. 170-72; R-3)

Williams testified that he had one local meeting with Doss at which Farrar was present, as well as the business agent, and had got most of the documents prior to that time. The meeting satisfied a contractual requirement that there be a local meeting between the union and the company to discuss the case, especially a discharge case, to determine if it could be resolved under the Southern Supplemental Agreement. (Tr. 158-59) Williams testified that in all cases the company and union can only use documents they have provided to the other party, regardless of when they are obtained. (Tr. 159)

Williams testified on cross-examination that he did not see any indication that the trailer had slipped sideways or turned as Farrar had stated in his statement. (Tr. 161-63, 166) Williams

could not explain why the company would not have assigned an adjuster under the conditions of possible environmental liability that was believed to have obtained at the accident site. He was not responsible for the determination which was made by the corporate office. (Tr. 168-69) Williams also testified that in his opinion Tomlinson, who had presented cases on behalf of the union in front of the grievance committee before, was very reputable and had credibility comparable to his own with the grievance committee. (Tr. 172-73) Williams testified that he was a witness at the hearing pursuant to subpoena, and that he knew the outcome of the grievance as denial of the claim and reimbursement of Farrar for his cab fare from the accident scene back to his home facility. (Tr. 173)

The documentary evidence in the case consisted of eight exhibits submitted by Respondent and received in evidence. Farrar relied upon the transcript of hearing, R-8, and photographs of the scene of the accident, R-6, which had been presented to the grievance panel at the grievance proceeding. R-1 is the National Master Freight Agreement and R-2 is the Southern Region Over-the-Road Supplemental Agreement, both of which were referred to for limited purposes, and excess portions of which were removed of record as extraneous. (Tr. 122-23) R-3 consisted of the Discharge Grievance filed by Farrar with his attached statement of August 12, 2004, and a copy of a descriptive statement identified as having been prepared by Michael Doss for the Respondent Employer. (Tr. 170-72) R-4 was the Brief of the company in support of Farrar's discharge, together with the Notice of Discharge dated August 7, 2004, Exhibit A; a company Accident Report with attached unsigned handwritten statement by Farrar, Exhibit B; a Long Form Florida Traffic Crash Report filed by Officer Hill, Exhibit C. R-5 consisted of the inventory of documents presented of record to the grievance panel by the union. (Tr. 138-39) R-6 is four pages of photographs of various aspects of the accident scene and wreckage of the tractor trailer. R-8 is the transcript of the proceedings before the grievance committee, consisting of two union representatives, Bryant and Healea, and two employer representatives, Thomas and Webb.<sup>9</sup>

### Conclusions of Law and Discussion

Farrar filed an STAA complaint with OSHA in 2000 against Roadway, because he was disciplined for making an unscheduled stop in what he claimed was dense fog which he felt posed a safety risk. This complaint would have qualified as protected activity under STAA, and is treated as proved in the absence of contradiction, based on Farrar's testimony. Although Farrar testified that the complaint was ultimately dismissed for reasons unrelated to its merits, he contends that he was warned by an OSHA investigator that Roadway and its agents were likely to be vindictive, which motivated him to maintain a diary of subsequent problems with Roadway. The 2000 complaint is only relevant as protected activity which was the alleged cause of or motive for the Respondent's allegedly retaliatory or discriminatory activities at the grievance proceeding in 2004 against Farrar.

Farrar grieved his termination after the August 1, 2004, truck wreck as was his right under the union contract. That grievance proceeding provided the forum for the allegedly retaliatory action by Roadway which is the basis for a timely complaint and proof of the first

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<sup>9</sup> R-7, duplicative, was not offered or received in evidence.

element of proof under STAA, that the Complainant engaged in protected activity, which in this case obviously involved a truck safety issue, and which was allegedly the cause of the retaliatory or discriminatory action against Farrar. In attempting to prove these difficult causal relationships, Farrar lacked the assistance of counsel. (Tr. 34) This tribunal infers that, because of Farrar's testimony that he had continuing adverse interactions with Doss from the time of the 2000 complaint to OSHA to his termination of employment, Doss had the requisite awareness of the OSHA complaint, imputable to Roadway, as Farrar's employer, even though Williams, who presented Roadway's case to the grievance panel, professed not to have been aware of Farrar's 2000 complaint. Nevertheless, Farrar's case is fraught with difficulties.

What the Respondent had was a severely damaged tractor trailer which had run off the road and crashed while Complainant was driving. There were no witnesses, and Complainant's explanation regarding an unidentified oncoming vehicle with high beams and an evasive maneuver that caused him to lose control was plausible but not the only plausible explanation. Complainant has not established any authority or rationale that would have compelled Respondent to give him the benefit of the doubt under such circumstances, and its failure to do so does not seem unreasonable under the circumstances, or compel an inference that the failure to do so was retaliatory or discriminatory.

To prove his case, Complainant must establish that Respondent took adverse employment action against him because he engaged in protected activity. A complainant may initially satisfy his burden of proof by showing that a protected activity was likely to have motivated the adverse action. *Shannon v. Consolidated Freightways*, Case No. 96-STa-15, Final Dec. and Ord., Apr. 15, 1998, slip op. at 5-6. To satisfy this burden Complainant must prove (1) that he engaged in protected activity, (2) that Respondent was aware of the activity, (3) that Complainant suffered adverse employment action, and (4) the existence of a "causal link or nexus," which tends to prove that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Shannon*, slip op. at 6; *Kahn v. United States Sec'y of Labor*, 64 F.3d 261, 277 (7th Cir. 1995). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993). [\*Byrd v. Consolidated Motor Freight\*](#), 97-STa-9 at 4-5 (ARB May 5, 1998)

Farrar's theory was that, as a consequence of his filing his 2000 complaint against Roadway, his interactions with Roadway reflected continuing discriminatory and retaliatory actions against him stemming from the original complaint. Gratuitous advice from an investigator at OSHA at the time of the complaint caused him to keep a diary in which he eventually recorded a total of approximately forty issues and incidents of various types which he contends qualified as continuing retaliatory or discriminatory actions by Roadway. The alleged history of retaliatory conduct against him culminated when, after he was fired because of his accident involving destruction of the tractor trailer, Roadway allegedly presented false and misleading testimony or representations in proceedings before the grievance committee on October 26, 2004. Roadway accused him of causing an avoidable accident resulting in the wreck

of the tractor trailer he was driving from Valdosta, Georgia, to Lakeland, Florida, on August 1, 2004.

In proving his case on this record Farrar has had three major probative hurdles to overcome: (1) proof that the identified protected activity was causally related to allegedly retaliatory action four years later; (2) proof of adverse employment action against him by Roadway that was actually retaliatory or discriminatory; (3) proof of a causal relationship between his protected activity and Roadway's adverse employment action against him which could not be independently justified by factors unrelated to the cited protected activity. Farrar's theory, and the evidence on which he has sought to rely, pose severe conceptual problems and problems of proof, which he has not successfully overcome. The obvious adverse employment action which followed his accident involving destruction of the tractor trailer and damaged cargo was prompt termination of his employment by Roadway. However, Farrar's termination by Roadway is not the adverse employment action upon which the complaint before this tribunal is based. In any event, the fact of the accident involving destruction of the tractor trailer and damaged cargo utterly dwarfs any attenuated inference of causal nexus based on the lapse of time between Farrar's failed complaint to OSHA in 2000 and termination of his employment four years later, even if Farrar's relationship with his manager and Roadway may have involved continuing difficulties over the intervening four years.

By extension, after the intervening accident involving destruction of the tractor trailer and damaged cargo, any such inference, temporal or otherwise, between Farrar's 2000 complaint and Roadway's adverse presentation of its case at the grievance proceeding would be by any reasonable assessment wholly dissipated. Even if some residual causal effect upon Roadway's presentation to the grievance panel could be established, proof that Roadway's presentation actually involved false testimony or misrepresentations would be difficult in the adversarial context of the grievance proceeding. Any suggestion that Roadway's contention at the hearing of a grievance filed by Farrar that Farrar was at fault for the truck accident is inherently, or in and of itself, retaliatory or discriminatory action must be rejected as unreasonable. For this tribunal to conclude that false or misleading testimony or representations were presented to the grievance panel, such proof would have to be demonstrably and patently false or inherently incredible. There is no indication of such in the record of the grievance proceeding or the dismissal of the grievance by the grievance panel. The inferences to be drawn from the tire tracks shown on the photographs before the grievance panel were arguable, but by no means conclusive on this record, that Farrar slipped onto a soft shoulder of the road and lost control, rather than fell asleep. There is no suggestion of bad faith on the part of either party in their respective presentations at the grievance proceeding. Consequently, Complainant has not proved that there were false or misleading presentations, or retaliatory presentations, to the grievance panel, and the complaint must be dismissed.

In his attempt to establish the requisite causal nexus between his 2000 complaint and Roadway's allegedly retaliatory presentation at the grievance proceeding, Farrar lodged with this tribunal a packet of documents which includes his diary to be part of the record. He asserted that they would establish a continuum of discriminatory and retaliatory action stemming from his original OSHA complaint. He testified that the packet had been submitted originally to OSHA in support of his current complaint, but that it had been returned to him unopened because OSHA

had ruled his complaint untimely. This tribunal treated the documents as a proffer by Farrar intended to prove motive for the allegedly retaliatory action before the grievance panel. Their admissibility into evidence was objected to by Roadway. After briefing, this tribunal ruled that the material would be admissible as background related to proof of Roadway's retaliatory motive, and prescribed a limited mode of proof to avoid distraction and waste of time. Roadway objected to the ruling and the limitations on proof, and declared at the hearing that it would dispute any and all such proof if the proffered documents were admitted.

To avoid such protracted litigation until it could assess the effect of such proof upon the outcome of the case, this tribunal required that Farrar prove, first, that the original complaint to OSHA in 2000 occurred and was protected activity; second, that Roadway had in fact presented false or misleading testimony or representations to the grievance committee at the grievance proceeding. At that point the appropriateness and admissibility of admitting evidence comprising the proffer would depend upon an affirmative finding that false or misleading testimony had been presented to the grievance committee on October 26, 2004, so that the need for proof of motive for such false testimony or information could be established. Because Farrar did not prove that testimony or representations Roadway presented to the grievance committee was actually false or misleading by a preponderance of the evidence, further litigation related to allegedly discriminatory actions by Roadway against Farrar between 2000 and 2004 as background to proof of motive was unnecessary and the proffer was rejected as of negligible probative value, but likely to involve substantial waste of time and costs for contentious and attenuated proof regardless of outcomes.

The grievance committee, which found against Farrar and denied his grievance, had extensive experience with both the trucking industry and grievance proceedings. The panel's two union and two employer representatives were unrelated to the parties or to the local union which would tend to promote impartiality. Questioning by panel members and other conduct in the grievance proceeding was reasonable, and disclosed no evidence of hostility, bias, or unfairness toward either party. Neither party was inhibited in presenting its case. Farrar conceded as much on the record of the grievance proceeding. The case for each party was presented by an apparently competent professional experienced in such presentations at grievance proceedings, though neither presenter was a lawyer. There was no evidence in the record of significant or substantial disparity in ability or credibility of these presenters with the grievance panel. Thus, the established adversarial process before the grievance panel provided a reasonable opportunity to discover, disclose, and identify any reasonably obvious falsehood or misrepresentation by Roadway, even though only Farrar gave testimony.<sup>10</sup>

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<sup>10</sup> The technical distinction raised with Complainant at the outset of the hearing between testimony and representations or argument not under oath is not deemed to have substantial effect upon the analysis or outcome of this case. What has been assessed is, as Farrar contended, that certain representations were made by or on behalf of the Respondent in relation to the truck accident in question, and whether those representations, however characterized, were false or misleading or otherwise discriminatory or retaliatory in character. It is evident from examination of the transcript of the grievance proceeding, which appears to be complete and intelligible, that the parties had a fair opportunity to present their conflicting assessments of the tractor trailer accident. In its essence, Farrar's complaint is that the Company, and ultimately the grievance panel, interpreted the available evidence adversely to him.

The representations made on behalf of Roadway, individually or collectively, did not so exceed the bounds of reasonable adversarial argument as to be unreasonable, nor any of the representations inherently or, in and of themselves, retaliatory. Even though Farrar's alleged nemesis, Michael Doss, who was the corporate representative at the hearing before this tribunal, briefed Roadway's representative who presented its case to the grievance panel, there is no dispute that the tractor trailer was wrecked and overturned in a ditch beside the road, and the issue before the grievance panel was whether, as Farrar contended, he had been forced off the road by an oncoming vehicle with high beams, and had lost control of his tractor trailer because of a soft shoulder, or whether, as Roadway contended, he had fallen asleep and run off the road. Farrar's testimony describing his version of what happened to cause the accident, and to what extent the photographs in evidence supported his assessment does not conclusively refute Roadway's contention that he fell asleep and lost control, so as to have rendered Roadway's contention clearly recognizable as false or misleading, or so patently unreasonable or incredible or so improbable as to have exceeded the limits of fair and reasonable adversarial argument.

Farrar emphasized the failure of the Employer to give controlling effect to the assessment in the police report of no fault, and to an alleged failure by the Employer to conduct a detailed investigation and to send an insurance adjuster to the scene. The fact that Respondent might not have conducted a substantial investigation after the wreck does not reflect upon the issues of whether Respondent's presentation at the grievance hearing was retaliatory or involved false or misleading testimony or representations. It is not clear to this tribunal how such a failure in the circumstances would have been retaliatory or imbued a retaliatory character into the Respondent's presentation at the grievance proceeding.

The fact that the state trooper did not issue a citation to Complainant in relation to the accident or that Roadway did not accept the omission as controlling or dispositive does not establish the absence of fault on Farrar's part, or that Roadway's refusal to accept it as such would be retaliatory or discriminatory. There are no obvious indicia of criminal behavior, and Farrar's claim was unresolved. The time sequence identified by Farrar in his testimony to the effect that he was immediately relieved of duty at the time of the accident on August 1, was discharged by letter dated August 7, and receipt of the accident report from the Highway Patrol, which he had apparently obtained on August 17, is not indicative of any predisposition to bias or discrimination that is apparent to this tribunal.

This tribunal is not charged with determining definitively what caused the truck accident, or with assessing ultimate fault or causation with respect to the wreck of the truck. It is only charged with determining whether Roadway's conduct at the grievance proceeding reflected a discriminatory or retaliatory response to protected activity by Farrar under the STAA, because it might have caused Roadway to present false or misleading testimony or information to the grievance panel. It appears that the information which Employer had was before the panel, which was qualified to draw its own inferences and did not sustain the grievance. This tribunal concludes simply that Farrar has not proved by a preponderance of the evidence that Roadway's conduct before the grievance panel was discriminatory or retaliatory in nature, and the fact that Roadway assessed fault against the driver, where the inference of such fault is not obviously unreasonable or manifestly erroneous on this record and in the aftermath of the serious

unwitnessed truck accident Roadway's conduct at the grievance proceeding was neither inherently or facially vindictive nor retaliatory.

Farrar's independent proffer of proof, had it been accepted, would not have been sufficient on this record to establish such a motive. A four year temporal separation between the initial OSHA complaint cited by Complainant and the grievance proceeding is too long on this record to compel an inference of causal nexus. Forty separate incidents of diverse character, even if undisputed, could support widely varying assessments as to their significance, and inferences with equal probity of adverse interpersonal relations, or independent sources of friction, ill will, or incentives for adverse action unrelated to the original OSHA complaint. Independently, or collectively, they could have superseded any original incentive for retaliation stemming from the original OSHA complaint. Because of the number and variation in types of issues cited by Farrar in his proffer over the approximately four years between Farrar's original OSHA complaint in 2000 and the grievance proceeding on October 26, 2004, this tribunal concludes that, even assuming that all of the issues and incidents were proved to be adverse actions, many involving Employer's manager against Farrar, and even if Farrar were vindicated or proved to be without fault with respect to them, it would be utterly improbable that so many could be proved to be in retaliation for the original OSHA complaint or to prove that Roadway's presentation at the grievance proceeding was retaliatory in nature. Extended proof by Farrar of the individual incidents in question, whether or not disputed by Respondent as threatened, could not reasonably be expected to affect the outcome of this case or to establish the retaliatory motive or effect that Farrar alleged.

It follows that Farrar has not proved that false or misleading testimony or other information or argument was used against him at the grievance proceeding on October 26, 2004, in retaliation for filing his 2000 complaint against Roadway with OSHA or for any other discriminatory purpose under the STAA. His complaint, therefore, is not established and must be dismissed.

#### ORDER

The complaint of William S. Farrar filed April 16, 2005, against Respondent Roadway Express under the STAA is dismissed.

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Edward Terhune Miller  
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. 29 C.F.R. § 1978.109(a). The parties may file with the Administrative Review Board briefs in support of or in opposition to the Recommended Decision and Order within thirty days of the issuance of this Recommended Decision, unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule. 29 C.F.R. § 1978.109(c).